In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1118

STAVROS C. THOMAIDIS AND HELENA THOMAIDIS,
PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 431 F. 2d 711.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1970 (Pet. App. B). The petition for writ of certiorari was filed on December 17, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the administrative denial of petitioner Helena Thomaidis' application for adjustment of status to that of an alien admitted for permanent residence

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constituted a legitimate exercise of discretion in the circumstances of this case.

STATUTE INVOLVED

Section 245 of the Immigration and Nationality Act of 1952, 66 Stat. 163, *et seq.*, as amended, 8 U.S.C. 1255, provides in pertinent part as follows:

> (a) The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

STATEMENT

The relevant facts, which are summarized in the opinions of the board of immigration appeals and the special inquiry officer (Pet. App. C and D), show the following:

Petitioners, who are Greek nationals (Pet. App., p. xi), first came to this country in 1963 from Argentina as nonimmigrant visitors. Stavros Thomaidis entered first, ostensibly to engage in an import-export business between Argentina and this country; however, he quickly obtained different employment (Pet. App., pp. v–vi). Helena Thomaidis then joined him as a nonimmigrant visitor and almost immediately became employed. Thereafter, both applied for extensions of stay

in the United States. In his application Stavros falsely stated that he was self-employed; Helena falsely stated that she was unemployed. The Immigration Service instituted deportation proceedings and granted the privilege of voluntary departure in lieu of deportation. Petitioners left for Argentina in August 1964 (Pet. App., p. vi).

Petitioners returned to the United States in November 1964 and were again admitted as nonimmigrant visitors on visas. They reentered with the express purpose of seeking permanent residence by way of a private bill (Pet. App., pp. vi, xi).

Petitioners again violated their status by accepting employment here, and overstayed their authorized time (Pet. App., p. vii). A second deportation proceeding was thereupon commenced (Pet. App., pp. ii, iv, x). The special inquiry officer entered an order that petitioners be deported to Argentina and petitioners' appeal to the Board of Immigration Appeals was dismissed on December 1, 1965 (Pet. App., p. v). Upon Argentina's refusal to allow petitioners to enter, the deportation proceedings were reopened on January 15, 1968, so that a new country for deportation might be designated [1] (Pet. App., p. v).

At the reopened hearing, Helena applied for the discretionary relief of adjustment of status to permanent

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[1] In the meantime, Helena's employer obtained for her a sixth preference visa petition for quota purposes under Section 203 (a)(6) of the Act, 8 U.S.C. (Supp. V) 1153(a)(6); she is employed as a manicurist with a specialty of rebuilding damaged fingernails (Pet. App., pp. vii, xii).

residence under Section 245 of the Act.[2] The special inquiry officer denied adjustment of status on the ground that petitioners had come to this country as nonimmigrants under circumstances which circumvented the normal visa-issuing process before an American consular officer abroad; in support he relied upon previous decisions of the Board of Immigration Appeals, *Matter of Rubio-Vargas*, 11 I & N Dec. 167 and *Matter of Diaz-Villamil*, 10 I & N Dec. 494. (Pet. App., p. viii.) Petitioners were granted the privilege of departing voluntarily in lieu of deportation; alternatively, their deportation to Greece was directed if they failed to depart voluntarily.

On March 28, 1969, upon a *de novo* examination, the Board affirmed the special inquiry officer's decision (Pet. App. D and E).

ARGUMENT

Petitioners contend that the denial of Helena's application for adjustment of status as a matter of discretion was defective because the special inquiry officer based his determination upon earlier decisions of the Board of Immigration Appeals in similar cases, thereby (1) failing to exercise his personal discretion (Pet. 7–9) and (2) unlawfully relying on evidence not

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[2] Stavros could not meet the visa-availability requirement of Section 245 because, as a native of Turkey, he would have to apply under the over-subscribed nonpreference portion of the Turkish quota. If Helena's Section 245 application were approved, however, she could petition in Stavros' behalf as an "immediate relative" under Section 201(b) of the Act, 8 U.S.C. (Supp. V) 1151(b) (See Pet. 5).

in the record (Pet. 9–12). This contention is groundless.

Section 245(a) of the Act, 8 U.S.C. 1255(a), authorizes the Attorney General, in his discretion, to adjust the status of aliens in the United States to permanent residence if they meet certain statutory conditions; the effect is to provide a discretionary avenue of relief for eligible nonimmigrant aliens in the United States to obtain permanent residence status without proceeding to a consulate abroad to submit to the normal immigrant visa-issuing process. See Gordon & Rosenfield, *Immigration Law and Procedure*, §§ 7.3 and 7.7. The statute gives no guidance as to the specific matters to be taken into consideration or the weight to be given to favorable or adverse factors in the process of making this discretionary determination. It is for the Attorney General to develop appropriate criteria in this regard. See *Fook Hong Mak* v. *Immigration and Naturalization Service*, C.A. 2, No. 34237, decided November 24, 1970; *Jarecha* v. *Immigration and Naturalization Service*, 417 F. 2d 220, 223–224 (C.A. 5). The consideration of such cases has led to the development of consistent administrative criteria barring discretionary relief to any nonimmigrant alien who has obtained entry to the United States in a temporary status with the intent to remain permanently and thereby avoid the usual immigrant processing procedures abroad, unless there are strong countervailing equities. *E.g.*, *Matter of Tonga*, 12 I & N Dec. 212 (B.I.A.); *Matter of Rubio-Vargas*, 11 I & N Dec. 167 (B.I.A.); *Matter of Diaz-*

Villamil, 10 I & N Dec. 494 (B.I.A.). This position has been consistently upheld in the courts as a proper principle for the exercise of discretion. *E.g.*, *Chen* v. *Foley*, 385 F. 2d 929, 935 (C.A. 6), certiorari denied, 393 U.S. 838; *Santos* v. *Immigration and Naturalization Service*, 375 F. 2d 262, 264 (C.A. 9); *Cubillos-Gonzales* v. *Immigration and Naturalization Service*, 352 F. 2d 782 (C.A. 9); *Castillo* v. *Immigration and Naturalization Service*, 350 F. 2d 1 (C.A. 9). Thus, when the Special Inquiry Officer considered this case under the above standard he was not refusing to exercise discretion or relying on evidence outside the record; he was merely exercising discretion within the limits properly established by the Attorney General in accordance with normal adjudicatory procedure. Indeed, by regulation, selected decisions of the Board of Immigration Appeals, such as the ones cited above, "serve as precedents in all proceedings involving the same issue or issues" 8 C.F.R. 3.1(g) (1970).

In any event, any possible defect in the decision of the Special Inquiry Officer was cured by the Board of Immigration Appeals. The Board has jurisdiction to exercise *de novo* the authority and discretion of the Attorney General to the extent deemed necessary for proper disposition of each case before it. See 8 C.F.R. 3.1(d)(1); *Navarrola-Bolaina* v. *Immigration and Naturalization Service*, 395 F. 2d 131 (C.A. 9); *Ng* v. *Pilliod*, 279 F. 2d 207, 211 (C.A. 7), certiorari denied, 365 U.S. 860; Gordon & Rosenfield, *supra*, § 1.10e(2). That was what the board did here, specifically finding that the favorable factors were not

strong enough to overcome petitioners' deliberate attempt to avoid the normal visa-issuing procedures abroad (Pet. App. D). The court of appeals thus properly held that no abuse of discretion had occurred.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971